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ABSTRACT

In response to the resurgence of racial incidents and increased "gay-bashing" on higher education campuses in recent years, campus authorities have instituted harassment codes thereby giving rise to a conflicts with free speech. Similar conflicts and challenges to free speech have arisen recently in a municipal context such as a St. Paul ordinance applied to a cross burning incident recently upheld in the Minnesota Supreme Court. However, these conflicts with free speech on campuses also raise issues of academic freedom complicated by the traditional academic abstention doctrine. This concern for civility is not new, in particular, the Politeness Movement established by philosopher David Hume had a lasting and broad impact on academic culture. In the current debate central questions include whether free speech is really free if one side is too intimidated to speak, what the responsibility of the university is to guarantee free speech and whether there should be an academic-pedological exception to free speech guarantees. The constitutional protection of free speech relates essentially to the rights of the citizen, but the scholar on campus is in a special position defined more accurately by academic freedom than free speech. (JB)

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CIVILITY ON CAMPUS: Harassment Codes vs. Free Speech

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CIVILITY ON CAMPUS: Harassment Codes vs. Free Speech

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As recent years have seemed to witness the resurgence of ugly racial incidents on campus as well as increased "gay-bashing" and sexual harassment, more and more campus authorities have enacted so-called harassment codes, codes of conduct designed to retain civility and rational discourse on campus by deining and regulating hate speech.

As these incidents, such as the attack by a group of white U. of Maine students on a group of Asian Americans, continue, more and more campuses are putting these codes into place. At the same time, the American Civil Liberties Union is challenging these codes not only by filing law suits, but by co-sponsoring federal legislation designed to create a legal right to challenge such codes for students at private institutions. [1] Since the legal protection of free speech is grounded on the First Amendment to the U.S. Constitution and requires "state action" to establish jurisdiction, there are no present legal, or Constitutional, grounds for a law suit based on free speech against a private university.

So, once again, public policy and history to the contrary, public and private universities are treated differently under the

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[1]. This legislation was undoubtedly inspired by the recent expulsion at Brown University of a student found guilty of harassment for the second time.

law. Two decisions, Doe v. Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) and UWM Post Inc. v. Univ. of Wisc. System, 60 LW 2244 (1991), have indicated that federal constitutional law standards, specifically the First Amendment protections of free speech, will be applied to public universities while private universities are still free to structure their own educational environments. In the haste to discuss the substance of the free speech issue, the different treatment aspect has been bypassed.

As Judge Friendly implied in Powe v. Miles, 407 F 2d 73 (2nd Cir. 1968), there seem to be few policy reasons which justify treating public universities differently from private universities. This is particularly so since our oldest and most prestigious "private" universities were founded at a time when the public/private dichotomy had no meaning and the colonial governments of their time were actively involved in their funding and administration. This analysis is often used to argue that students at private institutions are entitled to the same legal procedural protections as those enrolled in public institutions. However the argument cuts in the opposite direction as well. In this context it is well to remember that the current debate on Constitutional protection of campus free speech is absolutely irrelevant to students at private colleges and universities. Perhaps the most important conclusion to be drawn is that academic law ought to be a distinct, and unified, branch of law, including Constitutional law.

Both public and private universities do have a constitutional

status which might be considered by the courts for the purposes of the uniform administration of justice in our colleges and universities. The constitutional doctrine to which I refer is that of academic freedom, an implied right discussed in the McCarthy era cases, described by Justice Douglas as within the penumbra of the First Amendment in Griswold v. Connecticut, and specifically referred to in more recent higher education cases such as Bakke and Horowitz[2]. A related but slightly different protection is found in the doctrine of academic abstention or judicial non-interference under which the courts refrain from making academic judgments outside their area of expertise. Finally, the Supreme Court in the Sinderman[3] case recognized the existance of "campus common law", the customary law which has been applied on all campuses for centuries. Combined, these doctrines form a powerful argument that all universities, public or private, ought to be able to be as free as possible from outside interference, including legal interference, in order to protect the freedom to teach and learn, and to reserve academic decision making to academics.

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2. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), a case concerning legislative investigation of university teaching, the Court said, "The essentiality of freedom in the community of American universities is almost self-evident." Academic freedom is mentioned by name as a First Amendment freedom is Griswold v. Connecticut, 381 U.S. 479 (1965). In University of California Regents v. Bakke, 98 S. Ct. 2733 (1978) the Court wrote "The freedom of a university to make its own juddgments as to education includes the selection of its student body." In University of Missouri v. Horowitz, 98 S.Ct. 948 (1978) the Court declined to intervene in an academic dismissal of a medical student.

3. Perry v. Sinderman, 408 U.S. 593 (1972).

Under current court decisions the doctrines of both academic freedom and academic abstention apply most strongly when the question at hand is clearly academic: whether a student has adequately completed professional degree requirements, who may be admitted, whether a grade is fair. On the other hand, constitutional case law allows much greater judicial interference, usually to enforce due process standards, when university actions or regulations relate to "disciplinary" or non-academic questions. This protection of student rights came into effect because both public and private campuses were perceived as rather arbitrary in disciplinary matters, particularly in relation to the civil rights and anti-war movements.[4] As a result, the federal courts established some minimal due process rights in public universities and a contract theory emerged which established an implied term of fair treatment on private university campuses, a similar but not identical protection. Free speech cases on campus tend to be classified as within disciplinary precedent, although accurate characterization of these issues has not been thoroughly analyzed.

The policy question inherent in this analysis is whether college and university campuses should be granted an exception from applications of absolute free speech doctrines and allowed to make their own decisions regarding harassment codes within the limited

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[4] In 1954 Warren Seavey wrote a widely cited article in the Harvard Law Review in which he wrote that most universities expelled students without giving them the minimal protections afforded to a pickpocket in the criminal courts. "Dismissal of Students:'Due Process'", 70 Harvard Law Review 1406

context of academic discourse.

The discussions of the free speech controversy to date have tended to assume that the conflict between student rights to exercise free speech degrading and disgusting to others and university regulatory rights is in the disciplinary area, particularly where university regulations extend to speech outside the classroom. Perhaps it is time to re-examine that presumption, with particular reference to the current controversy.

When courts first began to give students constitutional rights on campus during the student protest era, they did not appear to give extensive consideration to whether all university actions on campus might to considered educational and hence protected by academic freedom or academic abstention. However, most student rights cases during this period, with the exception of Soglin v. Kauffman, a lower court case not widely followed, allowed universities a great deal of latitude in dealing with students while protecting or establishing a right to review university actions in court. Contemporary research as well as long-standing historical precedent indicate that the regulation of student speech on campus, anywhere on campus, is a part of the seamless web of academic process which ought, therefore, to be left undisturbed by the courts. The learning environment, its culture and climate have become increasingly important in the analysis of college teaching and learning. From the startling finding that students learn as much from their peers and from their professors and classes, to more current assessments of the importance of a

learning atmosphere to academic progress, current findings support the unitary nature of the university experience. Thus the courts should reassess the artificial line between discipline and learning. If the purpose of a university regulation is basically educational, the enforcement of that standard should be left to university officials without regard to constitutional law. This leaves intact the absolute constitutional protections of citizens, while allowing educators to make educational decisions unhampered by doctrines relating to political discourse rather than the learning process.

A student, as a citizen, may go downtown and say what he wishes confident in First Amendment protection. The status of a student on a university campus should be different.

In the first place, the student on a university campus is not in the same position as the public school students in Goss v. Lopez or other cases where jurisdiction depends on enforced attendance in public schools. No student is required to go to college, or a fortiori to attend a particular college. With the multiplicity of excellences in American higher education it is not possible to argue any institution's offerings are completely unique. One of the current misfortunes[5] of the orderly development of academic law is tendency of more and more courts to treat public school law and academic law as identical or closely related areas. They are not. The customs and traditions which form the backbone

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[5]Another is to treat universities, colleges or even community colleges as a form of business entity. They are not.

of academic law date back 900 years. Public school law, highly statutory in nature, cannot claim that same tradition. Numerous other distinctions, such as enforced attendance, faculty research responsibilities and a host of others mandate differing legal doctrines.

Historically, the student's academic freedom in post-secondary institutions was the right to choose his teacher, institution and course of study.[6] While in the student status, the scholar does not have an equal right of opinion, on an exam, for example. Further, it can be said, that by applying to enter a specific academic community, a student agrees to abide by its rules. Derek Bok, in his last book on higher education[7] argues that the student right of selection, his consumer rights in modern parlance, constitute a major regulatory force over higher education, one which he argues must be used more effectively. That choice once made, the business of learning in all its detail, including the regulation of campus speech, should be turned over to the academy and its practitioners. The courts should not interfere because it violates both the professional decision making of the professorate, (academic abstention) and the right of the institution to make academic decisions(academic freedom or institutional autonomy). Further, abstention by the courts in this context does not in anyway weaken the basic First Amendment protection of free speech.

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6. See Commanger, "The University and Freedom: Lhrfreiheit and Lehrnfreheit", 34 J. of Higher Education 3361 (1963).

7. University and Society

A word on academic freedom and institutional autonomy: many courts seem to assume that the institutional autonomy which underlyes academic abstention means that academic freedom rests in the administration or governing board of post-secondary institutions. Actually, academic freedom can rest only in individual faculty members; "institutional autonomy" refers to the right of the institution to protect that collective freedom. Under this rubric, professors, through their individual governance mechanisms should determine whether racial and sexual harassment is detrimental to education, and if so which specific forms should be prohibited and which sanctions applied and after which processes. It goes without saying that all sanctions are academic, or related to learning. It also goes without saying that in the tradition of American higher education, different institutions may come to different conclusions on these matters, and students may exercise their rights of selection based in part on such standards. Court enforced protection of student free speech is simplistic which applied to university campuses. Courts should refrain from interfering with academic process except in the most blatant cases of repeated injustice. If a student does not like a university's standards, he may go elsewhere.

Why there should be so many, and seemingly such an increase of incidents on college campuses where open mindedness and rational discussion of ideas are pre-eminent values, is an issue that needs to be seriously addressed by all members of the academic community. Is it in part that the current crop of students fail to understand

the history and achievements of the civil rights movements for minorities and women because those facts are to long ago for them to remember and too recent to be taught as history? Do we assume that the increasing tolerance and civility of every day life teaches more than it actually does? As most campuses realize the primary responsibility is educational, but the question is whether the educational strength of anti-harassment codes can overcome legal challenges based on the Constitutional protection of free speech.

The issues posed by the conflict between these two cherished values of American society, free speech and academic freedom from harassment are difficult for many. Free speech is an American value evoking a response almost religious in its intensity. Free speech harkens back to our revolutionary heritage; our right to revolt against tyranny in any form. Once that banner has been raised, little else of rational discourse is heard by many. That this is so exactly illustrates the problem which needs to be addressed. Some might question whether the stirring of the blood and lifting of the heart that many of us feel when free speech is mentioned is not in fact misplaced in ac academic setting.

The movement to enact laws forbidding racial, sexual or homophobic harassment has not been unique to universities. Any evaluation of the legal challenges to student codes must be placed in the larger context of free speech challenges to state laws. Since these laws do not enjoy the counter-balancing legal protections of academic abstention and academic freedom which exist

on campus, the validation of society wide harassment codes applies even more strongly on campus.

One of many such municipal ordinances was recently upheld by the Minnesota Supreme Court against a challenge to the law's constitutionality on the grounds of overbreadth (Matter of Welfare of R.A.V., 464 N.W. 2d 507, 1991). Since a federal constitutional issue is involved, the case is presently on appeal to the U.S. Supreme Court. In that case, a cross was burned on the lawn of a black family in the middle of the night in St. Paul. The defendant was convicted under an ordinance prohibiting bias-motivated disorderly conduct. Although the defendant did not dispute that the cross-burning was a violation of the law which was not constitutionally protected, under federal constitutional law he was permitted to challenge the ordinance on the grounds that it potentially censored so man constitutionally protected activities that it must be invalidated. The Minnesota Supreme Court disagreed, citing Minnesota constitutional law which allows that court to narrowly interpret a law to reach only unprotected conduct, and a line of Minnesota and federal cases limiting the reach of such statutes to the famous "fighting words" of Chaplinsky v. N.H., 315 U.S. 568, 1941, and the exception for expressive conduct "likely to provoke imminent lawless action" found in Brandendburg v. Ohio, 395 U.S. 444, 1969. Although the Supreme Court has struck down a number of state laws limiting free speech and expressive conduct since deciding the Chaplinsky case in 1942, it has always explicating stated that the "fighting words"

exception to the constitutional protection remains intact. That exception applies to, and allows the prohibition of, speech or conduct that inflict injury or tends to incite immediate violence". As Mari Matasuda notes in her recent article in the University of Michigan Law Review (87 Mich. L.Rev. 2320, 1989) "There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples of signs...that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context." The court further distinguished the Minnesota law from Texas v. Johnson, the flag burning case, because the Minnesota law applied only in a specific context in which those charged know or should know, will create anger, alarm or resentment based on racial ethnic, gender or religious bias.

Thus the Minnesota case reaffirms what has been generally assumed by a number of lawyers in this area: that codes limiting sanctions to speech or expressive conduct which constitutes "fighting words", and which is directed to a specific person rather than to a class of persons, will pass Constitutional tests. However the recent U.S. District Court opinion invalidating on the grounds of over breath the University of Wisconsin Code, specially designed to come within the parameters of Chaplinsky, indicate that at least some courts require that the Chaplinsky test be very narrowly interpreted.

Another Supreme Court case which would seem to validate the enactment of harassment codes in the larger social context is Meritor Savings Bank, FSB . Vinson, 477 U.S. 57, a 1986 sexual harassment case which established a remedy under Title VII of the Civil Rights Act of 1964 for individuals exposed to a hostile or offensive work environment, even though such an environment did not result in the tangible loss of a job or other employment benefit. The "hostile environment" aspect of the decision has been generally interpreted to apply to offensive words only, in addition to offensive touching. As a result of this case many employers, including academic employers, on the advice of their lawyers established sexual harassment policies. The recent decision awarding tenure to Dr. Jew, an Asian American woman on the U. of Iowa medical faculty seems based primarily on the detailed assertions of <u>verbal</u> sexual harassment which Dr. Jew was able to prove. Many current campus harassment codes, such as the one in use at Emory University, are the result of simply adding words relating to race and ethnicity to previously existing policy statements on sexual harassment required by Title VII. Further, as Matsuda notes, expression is frequently limited in the business arena, as in requiring accuracy in product labelling, and in professional contexts, the most notable being the requirement in some states that professors sign loyalty oaths. See "Public Response to Racist Speech: Considering the Victim's Story", 87 Mich. L. Rev. 2320, 2354.

However, the enactment of a harassment code on campus raises

a number of issues which do not exists elsewhere. When the issue is raised on campus, challenges are couched not only in terms of free speech, but also academic freedom, primarily the academic freedom of students. The issue posed appears to be, does the U.S. Constitution protect the academic freedom to use racial slurs, sexual epithets or similar expressions on campus (when Constitutional authority is used to challenge harassment codes, it can only be applied on public campuses).

On the other hand, campus officials are likely to cite the special circumstances applying in an educational context, and the long history of the reluctance of the courts to interfere in educational decisions made by educators which apply only on campus and have a clear educational purpose. This judicial doctrine, often referred to as the academic abstention doctrine, reflects the centuries old concern for the preservation of the institutional autonomy of universities as one means of preserving academic freedom. University officials are wont to argue that the free flowering and flowing of ideas requires a basic civility in relations on campus, and that this is a legitimate educational aim and object which ought not to be regulated by the courts or other outside authorities. Thus, the regulation of campus speech relates to the core academic or educational function of the university and comes under the protection of the doctrines of academic freedom, and institutional autonomy. The judicial doctrine of academic abstention has operated to restraint the courts from interfering in academic matters which relate to the core function of the

university, as in the application of Title VII and academic peer review. Thus it would seem that campus harassment codes are protected not only by the Chaplinsky-Meritor exceptions, but also by academic freedom and academic abstention doctrines.

The Supreme Court spoke in a related context recently when it upheld the right of a high school " to prohibit the use of vulgar and offensive terms in public discourse" in an admittedly political speech. Bethel School District v. Fraser, 478 U.S. 675 (1986).

The concern for civility on campus is not new. Although the slashing intellectual attack has been the academic style at some institutions on occasion, the need to establish the appropriate context for rational discourse has also been very important over the centuries. One clear example is the pertinent and clearly labelled "Politeness Movement" established during the time of the philosopher David Hume at the University of Edinburgh during the Scottish Enlightenment. The Politeness Movement was established in part to counter the perceived zealotry of the recently re-established Protestant ministry which was trying to establish uniform and conservative theological teaching at Scotti
sh universities.

The Politeness Movement sought to establish, among other things, civilized discourse and due regard for an opponent's point of view[8]. Specific conventions of speech were recommended to ensure

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[8]. Another aim was apparently to cement town gown relationships by establishing independent discussion groups among professors, business men, aristocrats and other professional thinkers of the day.

the fullest and freest "polite" exchange. It would appear that the flowering of this movement had a direct and positive effect on the flowering of intellectual activity. The mid 18th century decades of the Politeness Movement mark the emergence of the University of Edinburgh from relative obscurity to that of a pre-eminent international university, clearly surpassing, during those decades, the Oxbridge universities to the south. By the end of the 18th century the textbooks, treatises and histories which poured out of this movement were being used in an "astonishing" number of universities throughout Europe and America. Alexander Carlyle in The Usefulness and Necessity of a Liberal Education for Clergymen (1793) cites seventeen ministers who published 42 such books between 1746 and 1793. (Sher, 164-5). While the introduction the more sophisticated structure of the University of Leiden to the University of Edinburgh during this period also played a part, the Politeness Movement, and the resulting intellectual stimulation and ferment, is thought by many to be a major factor in establishing Edinburgh as one of the leading universities of that time, one cited by Jefferson and Franklin as a model for intellectual discipline in America which had a major impact on the emerging American intellectual community through such leaders as John Witherspoon, the early (1768) president of Princeton. Many argue that the ideas of the Scottish Enlightenment were crucial to the American revolution and academic culture (Bender, 101).

In our own century, Nell Noddings' comments on the encouragment of academic discourse through the lowering of voices

sounds a related educational theme. Noddings, who has written widely on feminist educational issues, recently commented on this slash and burn style of academic discourse at a conference on Ethics in Higher Education at Wayne State University. Haven't we all had the experience, she asked, of presenting a paper with a comment panel and having our heart sink a bit when professor X signed up as a commentator because of professors X's style of comment? Does that not often curtail our own presentation, especially the furtherest flights of what might be fancy and what might be inspired insight? Is not the creation and protection of rationalized and civilized discourse on campus a core value of academic freedom which ought to be protected rather than challenged by the law?

Persuasive arguments and rational thought should prevail rather than the ferocity of the presentation. Most importantly, the Politeness Movement and Nodding's analyses present clear educational theory and precedent to support the definition of speech regulation as a core academic matter which the courts should leave within the campus decision making processes.

The question being raised in legal challenges to harassment codes is whether free speech or academic freedom includes the academic license to deliberately or cruelly attack another for reasons often called biased or prejudiced. Does the forwarding of academic thought require the protection of verbal cruelty, deliberate or obtuse, or is the progress of academic thought better served by the establishment of a civil forum where all feel equally

free and welcome to present their ideas? Is academic validity related to academic cruelty in the mode of discourse? Can the university regulate only social, but not academic speech of students, or vice versa? Is there, in fact, a legally recognized student right of academic freedom? And, are these questions best resolved by the campuses or the courts?

As to the last question, it seems obvious that it will be, and is, being resolved in the courts because of the strong position of the first amendment freedoms in our legal system. Invoking the First Amendment is an almost sure guarantee of judicial intervention. So, setting aside for the moment the question of whether this issue can or should be settled on campus outside the courts, let us look for a moment at the current legal context. While the relatively little legal precedent at present does not give a clear or definitive picture, it does seem apparent that a court challenge may not automatically mean defeat of harassment codes. As noted above, the Minnesota Supreme Court recently upheld a municipal ordinance challenged as being unconstitutionally overbroad, and the Canadian Supreme Court has also upheld the concept. On the other hand, two federal court decisions, while only on the trial court level, spoke strongly against the use of such codes when they inhibit the expression of ideas, any ideas, in the classroom.

The basic question is whether free speech is really free if one side is too intimidated to speak. In an educational context, what is the responsibility of the university to guarantee that all

sides of a question receive an equal hearing? Of the exceptions to free speech, slander, invasion of privacy, and the equal time doctrine would seem to combine to support educational codes which have the aim of guaranteeing a freedom from harassment which inhibits a full and free discussion of ideas.

There is also some question as to whether there should not be some kind of academic-pedological exception to free speech guarantees. Surely a professor could not be required to allow a student to repetitiously reiterate a point of view every class period to the exclusion of material the professor wished to present. At some point, the right to manage instruction intersects with the right to free speech. Where? Do student and professor have equal rights of free speech as to substance? If a professor corrects a student's racial slurs, is that a violation of the student's free speech rights? If the student is expressing an opinion on an exam regarding the genetic basis for intelligence, does the professor inhibit the student's right to free speech if he marks the answer wrong? Does it matter whether the answer is factually established or only a matter of opinion? Who could determine these issues? Is a university wide system of sanctions for racial slurs different in substance from correction in class by the professor? Is free speech in this context in effect a negative value, that is, it protects a student who says the "wrong" thing, but does not guarantee the student an unlimited right to speak? If the instructor does not correct harassment, or does the harassing h/self, what institutional right is there to modify

the professor's right to teach as he sees fit, a core value of academic freedom? How do the institutional and individual values of academic freedom relate? Is the institutional right anything more than an aggregate right of the professoriate? If there is an additional duty, what is it?

Can codes sanctioning hateful speech by students on campus survive constitutional tests if they exclude classroom speech? Is there a need to include classroom speech? If the sanction is wholly educational, should this affect the constitutionality of the code?

Perhaps it will be helpful to take a final look at Doe v. Michigan, the case in which the U.S. District Court for the Eastern District of Michigan invalidated the harassment code then in effect on the University of Michigan campus, and at the modified code now in effect on that campus.

The original University of Michigan harassment code was not a modification of a previously existing sexual harassment code. It was written in specific response to racial harassment incidents on campus and was instigated and originally drafted by Robben W. Fleming, emeritus and acting president at the time. Fleming, a lawyer and life-long ACLU member simply felt strongly that an institutional response was necessary to the ugly incidents on campus. His original draft was much simpler than the one ultimately assessed by the federal district court. It aimed to require educational efforts to overcome demonstrated evidences of racial, sexual and ethnic harassment. The code was eventually

brought to court by "Doe", a nameless graduate student in psychology who asserted that he could not discuss his theories of treatment of homosexuality in class or elsewhere without risking violation of the harassment code. He submitted evidence of the three decisions made on campus under the code as evidence of the code's unconstitutionality. The court found these applications to be unconstitutional even though only educational sanctions applied. While one may argue with the application of Michigan's standards, the limitation of the sanctions to relatively mild educational efforts would seem to me to raise the question of whether free speech has actually been limited in a constitutional sense. In both Bakke and Horowitz the U.S. Supreme Court specifically approved the regulation of student conduct as an exception to constitutional requirements, albeit in a slightly different legal context.

Is the educational mission of campus academic freedom a strong enough and important enough educational value to overcome our deep constitutional commitment to free speech? I think it is. My position is essentially that the constitutional protection of free speech relates to the rights of all citizens, but that the scholar on campus is in a special position defined more accurately by academic freedom than by free speech. A student or professor should be able to go downtown in Cambridge, Ann Arbor or Berkeley and say whatever he or she wishes and be protected by the free speech doctrine. That liberty is necessary to democratic government. However, that same student should not have that same

freedom on campus. Academic freedom and institutional autonomy protect the right of the academy to govern its own house as long as the matters under consideration are educational. A student clearly does not have a free speech right to give a wrong answer on an examination or to misrepresent research in a written paper.

Essential to the validity and vitality of academic freedom as an exception to free speech is the nature of any disciplinary procedure and most particularly the nature of the sanctions. Perforce the sanctions in campus harassment codes are all strictly educational in nature. Most, except for the ultimate sanctions of suspension or expulsion which apply only to repeated deeply offensive violations as in the Brown University case, require the offender merely to undergo a learning experience of some type such as participation in a seminar or discussion group or writing a letter to the campus newspaper. This is a key point in allowing campuses to put some form of harassment codes in place. Who can say that requiring sensitivity training for gay bashing is a serious inhibition of free speech in the political sense?

Free speech should be untrammeled in the political context, but academic freedom requires that universities be allowed to address the issues of combatting the educational issues involved in racial and sexual harassment in their own way without interference from the courts even on a Constitutional basis in public universities. Many of the cases in which the Supreme Court considered academic freedom as a result of the McCarthy era turned on procedural points of due process. I submit that the courts

should, most legitimately confine themselves to that approach. Educational institutions should remain free to work out their own solutions to these problems without interference with the courts and without being held to general constitutional standards which are inappropriate and unnecessary in the educational context.

Many current analyses assume or imply that the constitutional protection of free speech on public university campuses is absolute. I think not. Academic freedom has clearly been recognized by the Supreme Court both by name in Griswold v. Connecticut and in a host of student and faculty cases, thus honoring a legal tradition going back to the 11th century. At the very least the requirements of academic freedom should be balanced against the right of absolute free speech, but more appropriately and more correctly, academic freedom should create a clear exception to the application of the Constitutional Free Speech doctrine on campus. Speech on campus, in class and out, should be regulated by campus authority as a matter of education and with educational sanctions. More importantly, since this is such a difficult and delicate matter, different campuses should be allowed to reach different solutions and conclusions. Students and faculty, after all choose their campuses; they are not required to be there. A case by case consideration in a number of different contexts presents the best chance for a true and lasting solution to this dilemma of competing values, and for the proper delineation and definition of the actual conflict. As always, in academe, and in the law, definitions are all important.

Most important of all is the preservation of the policy which allows the development and protection of free thought within a self-governing institution as a means of preserving some measure of academic freedom in an increasingly uniform and regulated society.